STATE OF MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals O'Connell, P.J., White And Cooper, J.J.

CITY OF GROSSE POINTE PARK, MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 125630

vs.

Court of Appeals No. 228347

MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL, Defendant-Appellant.

Wayne County Circuit Court No. 98-806998-CK

MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL'S REPLY BRIEF

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I. INTRODUCTION

This Court directed the parties to address three issues. The Park, however, has seen fit to completely ignore this Court's first question ("Whether sewage is a pollutant under the pollution exclusion clause?") and has restated and reordered the remaining issues in a manner the Park declares to be "proper." Rather than addressing whether sewage is a "contaminant" or "waste," the Park boldly announces that the "proper order of the questions begins with whether a court ... may consider all of the facts and circumstances surrounding the contract and its performance in determining whether a relevant contract term is capable of more than one meaning?" "The answer to this question," the Park instructs, "determines how we may go about answering whether sewage is encompassed within the term 'pollution' ..." (Park Brief, p 16) Even at that, the Park never addresses the pollution exclusion. It fails in its brief to discuss the coverage document's definition of "pollutants" and other pertinent portions of the exclusion. Rather, it engages in a mixed bag discussion of the parole evidence rule, course of dealing, course of performance, and an indefinite set of facts said to be "extrinsic" evidence of how the Pool or the Park or both (this is unclear) interpreted the exclusion at some unknown point in time.

This failure to first look to the contract is telling and has been condemned by this Court in prior rulings. Through fidelity to accepted rules of contract construction, this Court has reestablished the primacy of language in contract (and statutory) interpretation in this state. It has done so, in part, by reiterating that the starting point in contract interpretation is the language used and, if clear and unambiguous, that language controls. The Park wants to stand this rule on its head and its refusal to follow the path this Court designed in order to reach a decision in this case, exposes the weakness of its position. First of all, the Park has carefully avoided the language of the parties' contract because the contract excludes coverage for the discharge of pollutants and because sewage is a pollutant

under the contract. The Park's failure to address the issue of whether sewage is a pollutant must be taken as the Park's concession on that issue.

Furthermore, the Park's race to extrinsic evidence without any attention to the contract itself accentuates the danger in the Park's approach. Even the Park acknowledges that permitting the use of extrinsic evidence to establish ambiguity in an unambiguous contract creates "an incentive after a dispute has arisen for a party to attempt to manufacture an ambiguity in hopes of bamboozling the Court." (Park's Brief, p 24) As the 9th Circuit said in a case addressing antecedent contract negotiations, this freely open, subject view of contract interpretation "casts a long shadow of uncertainty over all transactions negotiated and executed ..." for "it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issues before the court; the contract cannot be rendered impervious to attack by parole evidence." Trident Carter v Connecticut General Life Insurance Company, 847 F2d 564, 568 (9th Cir 1988). Such juridical criticism of the liberal rule of contract interpretation and the Park's admission that the rule encourages the creation of extrinsic evidence of ambiguity, are particularly apt in this case. The parties' pollution exclusion clause is unambiguous, as many courts have held, and it squarely addresses the issue before the court. Yet, the Park asks this Court to ignore this clearly written exclusion and focus on "extrinsic evidence" of the weakest sort; evidence that offers no assistance in contract interpretation, even if considered by the Court. Furthermore, rather than offering actual "course of dealing" or "course of performance" evidence that truly touches on contract interpretation, the Park's real argument is that the Pool has waived its rights under the contract by the payment of other distinct claims. This, too, is not permitted in Michigan and under the express terms of the parties' contract.

Finally, the Pool's position on estoppel challenged the Park to identify even one piece of

evidence on the critical elements of estoppel, justifiable reliance and detriment. The Park has failed to meet that challenge. It failed, at least, to meet that challenge with truthful evidence. Rather, the Park has intentionally distorted the deposition testimony of a key witness to support its estoppel argument. Moreover, the Park's legal arguments on estoppel are without merit. The Park has not cited one case that supports its position that, after providing the Park with a clear and timely reservation of rights letter, the Pool may be estopped from asserting the exclusion.

II. REPLY TO COUNTER STATEMENT OF FACTS

The brief filed with this Court by the Park attempts to mislead the Court on the facts. This effort to mislead is extensive and appears in the Park's Counter Statement of Facts and throughout its brief. It includes reliance on evidence not properly before this Court, claims without any support in the record, and deliberate distortions of deposition testimony. Thus, what follows is a series of direct refutations of various factual claims made by the Park in its brief. Only the most pertinent are addressed.¹

A. THE COVERAGE DOCUMENT

The Park claims that the 13 insurance contracts between the Pool and the Park from 1985 to 1998 were "substantially the same," or are "similar" or "identical." (Park's Response Brief, pp 2, 28 and 23, respectively, and p 35) In fact, this case has been litigated under one coverage document. The Park's complaint alleged one-year contracts between the parties beginning in 1985. (Complaint,

There are others, equally lacking in support or false. One of the Park's more egregious misstatements is that it discharged into Fox Creek "pursuant to a state environmental permit" for the term it was insured by the Pool. (Park's Brief, p 3) Not true. The Park was without a permit for 9 years, from 6/77 to 1/78 and 6/82 to 2/91. (1975 Permit, Apx 1594a; 1978 Permit, Apx 957a; DNR letters, Apx 971a, 972a, 973a, 974a and 976a; Permit Renewal Application, Apx 962a; and, 1991 Permit, Apx 1423a) Thereafter, the Park was in violation of its permits by never pumping its maximum permitted amount of sewage to the Detroit treatment plant, thus, discharging more sewage into Fox Creek. (Park's Common Statement of Facts in the trial court, pp 7-8, Apx 69a-70a; 1991 Permit, Apx 1423a; and, 1995 Permit, Apx 1598a)

Apx. 48a – 49a) In the trial court, however, the Park offered only two insurance policies: the coverage document in effect for the policy term 8/1/94 to 8/1/95 (Coverage Document Apx 289a – 341a) and one other Pool policy dated "4/90" (Apx 431b – 458d). As to the latter policy, the Pool does not recall that it was identified or explained by the Park through admissible evidence. No other insurance contracts were admitted in the trial court and the Park did not submit evidence as to the content of the policies it now claims to be substantially the same, similar or identical.

B. THE ETHERIDGE CLAIM

The Park struggles to characterize the Etheridge claim as just another back-up of sewage into a basement. Not true. The same sewage was involved, but the Etheridge damage claims were broader and the case, in its totality, was distinctly different from a basement back-up claim for many reasons. The focus of Etheridge was long-term, environmental damage to the creek and the Fox Creek neighborhood. See the Pool's Brief on Appeal in this Court, pp 2-8. See also the summaries of the Etheridge plaintiffs' answers to interrogatories. Therein, Fox Creek residents reported that Park discharges into Fox Creek damaged boathouses, boat wells, docks, sea walls, boats and other items located in the creek, lawn furniture, plantings and other outdoor personal property, and garages. They graphically reported that the odor and stench of the discharges into Fox Creek denied them the use of their yards and invaded their homes from the outside. They said the content of the discharges in the creek prevented them from swimming in, fishing in, or otherwise using the creek. (Apx 849a – 888a) Moreover, the sewage in Etheridge did not originate in the sewer lines servicing Fox Creek homes and it did not get to the creek by accident. It originated in the Park as a "combined sewer overflow." It was intentionally transported to and discharged into Fox Creek and a Detroit neighborhood. The activity was regulated, but the Park was without the required permit for years or was in violation of its permits. A long and detailed public record exposed what the Pool saw as

intentional, illegal and wrongful conduct. Rather than damaging Park basements, the discharges into Fox Creek destroyed an entire neighborhood, and the means by which this happened and all of the circumstances of the case made it vastly different from a basement back-up claim.

C. THE EXTRINSIC EVIDENCE

The Park imprecisely claims the Pool paid "hundreds" or "several hundred" or "literally thousands" of basement back-up claims. (Park's Response Brief, pp 1, 4 and 14, respectively) The Park did cover basement back-up claims, but the Park's inaccurate numbers must be corrected. First, the Park's reference to 2,707 basement back-up claims (Park's Response Brief, p 6) comes from a document that was not submitted to the trial court on motions for summary disposition. What the Park did submit to the trial court was the testimony of Thomas Tucker, a claims manager at the Pool's outside adjusting firm, who testified that he did not know how many back-up claims the Pool paid but guessed that "200" were paid from 1990 to 1996. (Tucker Deposition, pp 55-56, Apx 712b) Additionally, the Park offered the Pool's Loss Control Report for the Park. This document shows the Pool to have covered for the Park – zero back-up claims from 1985-1991, one claim in 1992, 62 claims in 1993, none in 1994, 4 claims in 1995, and a 1996 claim identified in the Loss Control Report as the "Walters" claim, including "207" homes. However, the Walters lawsuit that followed had only 58 named plaintiffs. (Apx 1661a-1716a and Apx 1614a)

As to the purpose of this extrinsic evidence, the Park argues the Pool's payment of back-up claims "raises a question of whether pollution *in the contract* includes sewage," or it shows "the Pool and Park did not consider the pollution exclusion clause to encompass sewage," or it is evidence "of the meaning of the pollution exclusion clause." (Park's Brief, pp 14, 29, and 45, respectively) Yet, not one Park witness testified that the Park interpreted the pollution exclusion clause to not encompass sewage. The same is true for the Pool. No representative of the Pool testified that the

Pool interpreted the pollution exclusion clause in this fashion. The only witness to address the issue was Thomas Tucker (identified above), a claims manager at the Pool's outside adjusting firm. When asked about the Pool's coverage of basement back-up claims, he said, the fact that "sewage" was involved was not an issue in assessing those claims. "On that claim," he said, "the issue with regards to a sewer back-up has historically been looked at with regard to the cause of the back-up and the extent of the damage. So as to whether or not the sewage is being part of the content that backed up into somebody's home ...that would not have been the percipient (sic) issue in the general sense looking at that claim." (Tucker Deposition, p 55, Apx 712b)

D. THE POOL'S HANDLING OF THE ETHERIDGE CLAIM

In support of its estoppel claim, the Park has distorted the deposition testimony of the key witness on the issue and has otherwise presented a misleading picture of how the Pool adjusted the Etheridge claim. The Park claims the Pool decided to deny coverage in Etheridge on or about August 4, 1997; that it was not until "after" the first facilitation session that the Pool's adjustor reminded the Park's City Manager that coverage remained an issue; that the City Manager did not know in advance that coverage was to be discussed at a meeting between the parties on August 27, 1997; that the Pool informed its Board of Directors on September 3, 1997, that coverage had been denied in Etheridge; and, that Park representatives relied on actions of the Pool to believe coverage was afforded in Etheridge. (Park's Brief pp 9-10 and 43) None of this is true. The record is otherwise. On each of these points and others, the Court's attention is respectively directed to the "Etheridge Case Chronology" attached to the Pool's Brief on Appeal. This chronology provides a thorough review of the Pool's handling of the Etheridge claim, with each stated fact supported by documentary evidence and deposition testimony; testimony that is fully rendered and not altered for the purpose of misleading this Court, as the Park has done.

For example, the Park uses a portion of one sentence in the testimony of the Park's City Attorney, Harold Deason, as a means of completely misrepresenting that testimony. The Park states that an Etheridge case settlement discussion in July 1997, and other Pool conduct, led Deason to "believe" the Pool "was not relying on its reservation of rights letter." (Park's Brief, p 43) The Park attributes these words to Deason at page 121 of the transcript of Deason's deposition. (Park's Brief, p 43) In fact, Deason did not testify he believed the Pool was not relying on its reservation of rights letter. The actual testimony (referring to the "discussion" between the parties in July 1997) was as follows:

- Q: Okay. Did that mislead you in any way regarding coverage?
- A: That discussion could have led me to believe that the Pool was not relying on its reservation of rights letter.
- Q: Did it lead you to believe that?
- A: I don't know that I formed a specific conclusion at that time. (Deason Deposition, pp 120-121, Apx 556a)

Also, the Park characterizes the Pool's claims adjustor as tight-lipped about the coverage issue. The Park says the adjuster "dropped just one veiled hint" about coverage issues at a critical time in the case. (Park's Brief, pp 9 and 42-43) In fact, the Park received a reservation of rights letter and the adjustor reminded the Park's City Manager before the first facilitation session that coverage remained an issue. (Apx 912a, p 3) This, we suppose, is the "one veiled hint" identified by the Park. The Park fails to note the adjustor's testimony (not contradicted by the Park) that throughout the Etheridge case the adjustor frequently reminded the City Manager ("Dale") that coverage remained an issue. As the adjustor, Pamela Garrison, testified: "Dale had been told at the beginning and at every meeting after that" that the Park may not be covered in Etheridge. (Garrison

III. ARGUMENT

A. THE PARK HAS CONCEDED THAT SEWAGE IS A POLLUTANT UNDER THE POLLUTION EXCLUSION CLAUSE

The Park failed to address whether sewage is a pollutant under the pollution exclusion. Therefore, and because the Park's latent ambiguity argument requires the Park to admit that the exclusion is unambiguous, the Park has conceded that sewage is a pollutant under the pollution exclusion clause.

B. IT IS THE MICHIGAN AND THE MAJORITY RULE THAT EXTRINSIC EVIDENCE MAY NOT BE USED TO ESTABLISH AN AMBIGUITY IN AN UNAMBIGUOUS CONTRACT

It is the rule in Michigan that extrinsic evidence may not be used to establish ambiguity in a clear and unambiguous contract. See Michigan Crown Fender Company v Welch, 211 Mich 148; 178 NW 684 (1920); Sheldon-Seatz, Inc. v Coles, 319 Mich 401; 29 NW2d 832 (1947); Michigan Chandalier Company v Morse, 297 Mich 41; 297 NW 64 (1941); Moulton v Lobdell-Emery Manufacturing, 322 Mich 307; 33 NW 2d 804 (1948); Upjohn Company v New Hampshire Insurance Company, 438 Mich 197; 476 NW2d 392 (1991); Allstate Insurance Company v Freeman, 432 Mich 656; 443 NW2d 734 (1989); Kent County v Home Insurance Company, 217 Mich App 250; 551 NW2d 424 (1996); Klapp v United Insurance Group, 468 Mich 459; 663 NW2d 447 (2003); Edoff v Hecht, 270 Mich 689; 260 NW 93 (1935); Aetna Casualty and Surety Company v Dow Chemical Company, 28 F Supp 2d 440 (ED Mich 1998); Clark Brothers Sales Company v Dana Corporation, 77 F Supp 2d 837, (ED Mich 1999); Flajole v Gallaher, 354 Mich 606; 93 NW2d 249

² Apparently, to support its estoppel claim, the Park repeatedly refers to the trial court's involvement in <u>Etheridge</u> and that the Park asked the trial judge to take judicial notice of what transpired in <u>Etheridge</u>. (Park's Brief, pp 2, 15 and 42) Thus, it must be noted that the trial judge did not take judicial notice of anything from the Etheridge case.

(1958); Greyhound Credit Union v Aetna Life Insurance Company, 381 Mich 683; 167 NW2d 274 (1969); Quality Products & Concepts Company v Nagel Properties, Inc. 469 Mich 362; 666 NW2d 251 (2004); Farm Bureau Mutual Insurance Company of Michigan v Nikkel, 460 Mich 558; 596 NW2d 915 (1999), and others.

Michigan is in good company. Corbin reports that the "plain meaning" rule is the "majority view." Williston says the rule (the "objective standard") has been "adopted by the vast majority of courts." And, Farnsworth reports that the "overwhelming majority of courts" retain the rule. Corbin on Contracts, (Revised Ed) §24.7; Williston on Contracts, (4th ed) §31:1; and, II Farnsworth on Contracts, (2d ed) §7.12.³

C. THE MICHIGAN CASES CITED BY THE PARK DO NOT CONSTITUTE REVERSAL OF THE MICHIGAN RULE

The Michigan cases cited by the Park for the proposition that Michigan courts have "always" considered evidence outside the four corners of the contract to determine ambiguity (Park's Brief, pp 19-22), do not support this proposition and do not constitute a reversal of the Michigan and majority plain meaning rule. Furthermore, these cases do not support the Park's "course of dealing/course of

Corbin was critical of the rule. He argued for a wide-open approach to contract interpretation, permitting the consideration of all evidence, without limitation, even when the contract in dispute was clear on its face. Corbin, The *Interpretation of Words and the Parole Evidence Rule*, 50 Cornell Law Quarterly 161. Williston supported the Michigan rule, stating that, "When a contract is unambiguous, the court must, in the absence of a showing that the contract is voidable ... give effect to the contract as written..." and "If the language used by the parties is plain, complete and unambiguous, the intention of the parties must be gathered from the language and from that language alone ..." Williston on Contracts, (4th ed) §30:6 and §31:4, respectively. But, there is universal agreement that the written word is given priority in interpretation. Corbin reasoned that "the preeminence of express language is logical because the parties themselves chose the words of their contract." Corbin on Contracts, (Revised Ed) §24.6. According to Williston, "primary importance should be placed upon the words of the contract." Williston on Contracts, (4th ed) §31:4. Likewise, the Uniform Commercial Code places the language of the contract at the top of its interpretive hierarchy. UCC 1-205(4) and 2-208(2); MCLA 440.1205(4); MSA 19.1205(4) and MCLA 440.2208(2); MSA 19.2208(2).

performance" argument. None of the Michigan cases cited by the Park are course of dealings/ course of performance cases. The Park has not cited one Michigan case standing for the proposition that a course of dealing or course of performance may be used to establish an ambiguity in a clear and unambiguous contract. More specifically:

- McCarty v Mercury Metalcraft Company, 372 Mich 567; 127 NW2d 340 (1964), cert den, 380 US 952; 85 S Ct 1084; 13 L Ed 2d (1965) is a classic parole evidence case about negotiations between the parties before the contract was made. The court did not discuss the plain meaning rule and cited absolutely no prior Michigan authority for the proposition that extrinsic evidence is admissible to show ambiguity.
- Goodwin, Inc. v Orson E Coe Pontiac, Inc., 392 Mich 195; 220 NW2d 664 (1974) can only be seen as an aberration in Michigan law. First, the court cited McCarty, a case citing no precedent, to support the proposition that extrinsic evidence is admissible to prove the existence of ambiguity, where ambiguity "may" exist in the contract. Only Corbin's open door policy on contract interpretation would support such a radical rule. In any event, both the trial court and the Supreme Court found ambiguity within the four corners of the contract in this case.
- <u>Keller v Paulos Land Company</u>, 381 Mich 355; 161 NW2d 569 (1968) does not address Michigan's plain meaning rule and, based on argument of counsel and a survey, the court found that, because of an "ambiguous term in the contract, the trial court properly permitted oral testimony to determine the true intent of the parties." (p 362) Hence, it is unclear, but it appears the court justified its ruling on a finding of ambiguity within the contract.
- <u>In re Estate of Kremlick</u>, 417 Mich 237; 331 NW2d 228 (1983) considered the intent of the deceased in a Last Will and Testament, and the decision should be seen as limited to the process of interpreting a will, although the court did cite the aberrant <u>Goodwin</u> case.
- Hall v Equitable Life Assurance Society, 295 Mich 404; 295 NW2d (1940) is a case in which the trial court found ambiguity within the life insurance policy and, on this basis, admitted evidence of the deceased's intent. Likewise, the Supreme Court could not discover the deceased's intent "from a reading of the contract." (p 295). Hence, despite the court's discussion of latent ambiguity, this is a case of ambiguity within the instrument.
- <u>In re Estate of Traub</u>, 354 Mich 263; 92 NW2d 480 (1958) is a case based, not on Michigan law, but on Corbin, which certainly has not been adopted in this state.
- Oades v Marsh, 111 Mich 168; 69 NW 251 (1896) is a case in which the court found ambiguity within a will, stating that its decision was not in conflict with the appellant's position, which is set out in the opinion and can best be described as Willistonian.

Beason v Beason, 24 Mich App 178; 514 NW2d 231, peremptorily reversed, 477 Mich 1023; 227 NW2d 425 (1994) is a case in which the trial court found ambiguity within a divorce judgment and then looked to extrinsic evidence. The Supreme Court's reversal of the Court of Appeals left this trial court decision in place.

D. THE PARK'S EXTRINSIC EVIDENCE DOES NOT ESTABLISH AMBIGUITY IN THE POLLUTION EXCLUSION CLAUSE

Assuming the Court were to consider the extrinsic evidence offered and the argument made by the Park-that the Pool's payment of numerous basement back-up claims, before and after Etheridge, is evidence the Pool, the Park, or both, intended the clause to not apply to sewage-the Park's case fails. Even under the liberal, subjective approach to contract interpretation "course of dealing" or "course of performance" evidence must be "interpretive" conduct. Corbin argues that "course of performance" may be an aid in interpreting a contract, but cautioned that the weight to be given to such "practical interpretation" depends "somewhat upon the extent to which they (the parties) have applied that interpretation and somewhat upon the definiteness with which they applied their minds to the issue ... great weight can appropriately be given to a course of performance by a party that clearly indicates an interpretation contrary to the view later urged in court ..." (emphasis added) Corbin on Contracts, (Revised Ed) §24.16. For Farnsworth, such conduct is helpful only to the extent that it has a "bearing on interpretation." If Farnsworth on Contracts, (4th ed) §7.13. In this case, the Pool's payment of basement back-up claims had no bearing on either party's interpretation of the contract for the following reasons:

1. It is a matter of fact that the Park has never claimed, through a witness or otherwise, that before, during or after Ethridge, it interpreted the pollution exclusion clause to not apply to sewage. The only witness on the point, claims manager, Thomas Tucker, testified the Pool did not consider the content of the liquid involved in the many basement back-up claims the Pool covered. (See page 6, above.)

- 2. The Park never presented the several insurance policies that the parties are now alleged to have <u>interpreted</u> by course of dealing or course of performance. Without the language, without the words used in these contracts, the Park's claim that the parties' conduct under the policies is equal to "interpretation" is absurd. Note also, that the Park actually argues retroactive contract interpretation; that the Pool's coverage of basement back-up claims after <u>Ethridge</u> is conduct that aids in interpreting the contract applicable to <u>Ethridge</u>. Again, the Park did not submit the policies in question, but the obvious interpretation of these events is that the Pool applied the pollution exclusion to a combined sewer overflow case and continued its practice of not applying the exclusion to basement back-up claims.
- 3. As the court said in Martinelli v The Traveller's Insurance Companies, 687 A2d 443 (1996), an insurer may pay prior claims "for any number of reasons, including mistake." It is, of course, absolutely correct that insurers cover claims for a variety of reasons. Among these are avoidance of coverage litigation, doubt about coverage, mistake, carelessness, or to be helpful to an insured. The latter reason for providing coverage is especially the case for a member-funded, driven and operated self-insurance pool such as the Pool. Hence, as a stand-alone proposition, the payment of prior or subsequent claims cannot and does not bear on interpretation of a policy.
- 4. Etheridge was not a basement back-up claim. It was a combined sewer overflow claim and was obviously distinct and different from back-up claims. Payment on basement claims, for this reason alone, cannot serve to commit the Pool to a particular contract interpretation to a combined sewer overflow case. The provision of coverage on prior claims, and even assuming the Pool could have asserted the pollution exclusion on those claims, has no bearing on the Pool's interpretation and application of the parties' policy as to a subsequent and distinct claim.

E. AS A MATTER OF LAW AND BY THE EXPRESS TERMS OF THE PARTIES' CONTRACT THE POOL CANNOT BE HELD TO HAVE WAIVED ITS RIGHTS UNDER THE CONTRACT

As Farnsworth has cautioned, it is "sometimes difficult to draw the line between conduct that is the basis for a course of performance ... and conduct that is the basis for waiver or modification ..." II Farnsworth on Contracts, (2d ed) §7.13. It is not difficult in this case. The Park has also claimed that the Pool's payment of back-up claims (along with the Pool's handling of Etheridge) operates to estop the Pool from asserting the exclusion. Moreover, the Pool's payment of distinctly different claims does not bear on interpretation of the parties' contract, for the reasons stated. Thus, on close examination, the Park's course of dealing/performance claim is nothing more than a waiver claim. But, the Park's evidence is completely insufficient to support a waiver. The parties' contract contains an anti-waiver and modification clause. (Coverage Document, p 31 of 47, Apx 325a) That being the case, Quality Products and Concepts Company v Nagel Properties, Inc., 469 Mich 362; 666 NW2d 251 (2004) is controlling. In Quality Products, this Court held that waiver from course of performance or otherwise does not occur without "clear and convincing" evidence of a waiver of both the contract provision in dispute and, if present, an anti-waiver and modification clause. This, the Park has not done. Therefore, and its waiver claim, disguised as a contract interpretation issue, must also be rejected. Furthermore, see the cases cited in the Pool's Brief on Appeal to the effect that payment of other claims does not constitute waiver of policy terms. (p 49).

F. THE POOL MAY NOT BE ESTOPPED FROM ASSERTING THE POLLUTION EXCLUSION

The Park's argument in support of estoppel is wholly unpersuasive, legally and factually. On the law, the Park does not cite one case for the proposition that an estoppel may occur when the insured has clearly reserved its right to deny indemnification coverage in a timely manner. The best the Park can do is to argue by analogy from the rule in cases such as Merithew v Last, 376 Mich 33;

135 NW2d 353 (1965) and Cozzens v Bazzani Building Company v Westchester Fire Insurance Company, 456 F Supp 192 (ED Mich 1978) (Park's Brief, p 39-40), in which the courts estopped the insurer because it delayed in reserving its rights. The Park attempts to equate this with delay in a final coverage decision. The argument does not wash. The Park was on notice that coverage may not be provided and in every similar case in Michigan there was no estoppel. (Pool's Brief on Appeal, p 42) Finally, the Park is unable to cite even a single witness who testified that, because of action taken by the Pool, the Park believed that it had indemnification coverage in Etheridge and suffered detriment as a result. For these reasons and based on the legal and factual analysis in the Pool's Brief on Appeal (pp 39-48) the Park's estoppel claim must be rejected.

IV. <u>CONCLUSION</u>

This case is before the Court because the courts below failed to apply controlling rules of contract construction. As a result, the parties now find themselves with a contract different from the contract they made. At least now the Park acknowledges that sewage is a pollutant under the contract. Had the Court of Appeals majority followed and properly applied the rule that a contract's terms are to be given their plain and commonly accepted meaning and the rule that clear and unambiguous language may not be rewritten under the guise of interpretation, that issue would have been settled below.

Also, as a result of deviation from these and other rules by the courts below, this Court now revisits the rule on use of extrinsic evidence in interpretation of an unambiguous contract. The rule is clear. Extrinsic evidence may not be used to establish ambiguity in a clear and unambiguous contract. This is the Michigan and majority rule and it is well justified. "The plain meaning approach enhances the extent to which contracts may be relied upon by contributing to the security of belief that the final expressions of *consensus ad item* will not later be construed to impart a meaning other

than that clearly expressed." Steuart v McChesney, 444 A2d 659, 663 (Pa 1982). Additionally, the

rule "imparts stability to commercial transactions..." while an "analysis that begins with

consideration of extrinsic evidence ... unnecessarily denigrates the contract and unsettles the law."

WWW Associates v Giancontieri, 566 NE2d 639, 642, 643 (NY 1990). Moreover, as the Park

admits, great incentive for a party to create extrinsic facts that might permit escape from the explicit

terms of a contract is inherent in the alternative rule. That, in fact, is what happened in this case in

conjunction with a complete free fall from the well recognized and justified rule that estoppel does

not lie against an insurer that has provided a fully independent defense under a timely and clear

reservation of rights.

The facts of this case and the arguments made by the Park do not justify any change in these

rules. In fact, the course of this litigation exposes the danger in permitting the use of extrinsic

evidence to create ambiguity in a clear and unambiguous contract and demonstrates the justification

for the Michigan and majority rule that this is not to be permitted. In the end, therefore, the answers

to the questions asked by the court are found in well-known and justified rules of contract

construction and controlling precedent that the Pool respectfully submits should be affirmed and

followed in this case.

Respectfully submitted and prepared by,

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